

Decision **DRAFT DECISION OF ALJ PRESTIDGE** (Mailed 1/23/2004)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Pacific Gas and Electric Company (U 39 M), a California Corporation, and Froehlich Construction Co., Inc., for an Order Authorizing the Sale and Conveyance of a Certain Parcel of Land in Kern County Pursuant to Public Utilities Code Section 851.

Application 02-11-035
(Filed November 19, 2002)

**DECISION GRANTING APPROVAL UNDER PUBLIC UTILITIES CODE
SECTION 851 FOR CONVEYANCE OF A CERTAIN PARCEL OF LAND
IN KERN COUNTY TO FROEHLICH CONSTRUCTION CO., INC.**

I. Summary

This decision grants the application of Pacific Gas and Electric Company (PG&E) for Commission authorization under Public Utilities Code Section 851¹ for PG&E to convey two unimproved parcels of land located in Kern County to Froehlich Construction Co., Inc. (Froehlich).^{2 3} Froehlich plans to use the

¹ All statutory references are to the Public Utilities Code unless otherwise referenced.

² The application was filed on November 19, 2002. In Resolution ALJ 176-3102, dated December 5, 2002, we preliminarily categorized this proceeding as ratesetting and preliminarily determined that hearings are unnecessary.

³ On December 23, 2002, the Commission Office of Ratepayer Advocates (ORA) filed a protest, which addressed only the ratemaking aspects of the application. PG&E and ORA subsequently filed a stipulation regarding certain factual issues and agreed to address the ratemaking issues through briefing.

property as a parking field with landscaped buffer zones between the parking area and PG&E's transmission facilities that will remain on the site.

Consideration of the allocation of PG&E's gain on sale of this property is deferred to the Commission's gain on sale rulemaking, to be initiated in the near future.

II. Background

A. The Proposed Transaction

PG&E proposes to sell approximately 12.7 acres of undeveloped land⁴ located in the City of Bakersfield, County of Kern (the City), to Froehlich for \$120,000. Although Froehlich originally intended to utilize the property as a family recreational water park and obtained a rezoning from the City for this purpose, Froehlich no longer plans to develop the water park.⁵ Froehlich currently wishes to use the property as a parking field.⁶

PG&E originally acquired the property in 1947 for use as a corridor to accommodate the construction of the electric transmission lines running southerly from PG&E's Kern Power Plant, which is located approximately one-half mile north of the property. PG&E currently operates three electric transmission tower lines and one wood pole distribution line that traverse the property and owns transmission towers located on the property.

⁴ These parcels of land have been identified as Kern County Assessor's Parcel Numbers 501-010-12 and 501-010-20.

⁵ Statement of Ronald G. Froehlich, Jr., on Behalf of Froehlich Construction Co., Inc., Addressing Buyer's Intended Use of the Property, at page 2.

⁶ *Id.*

As a condition of the sale, PG&E has reserved easements as necessary to use, maintain, reconstruct, or replace existing on-site facilities, as well as additional facilities for the transmission and distribution of electric energy and for communication purposes. PG&E has also reserved the right to trim and cut down trees and brush that may interfere with its facilities; to install, maintain, and use gates in all fences on the property; and to install markers on the property.

According to the application, Froehlich approached PG&E regarding the possible sale of the property in 1996. PG&E then determined that, with the reservation of sufficient public utility easements on the site, PG&E no longer needs to own the property in fee. PG&E claims that it is unlikely that the property will again be useful for public utility purposes.

The City has condemned a small portion of the northern border of the property as part of the City's plan to widen Brimhall Road. PG&E seeks Commission authorization to either: (1) assign to Froehlich a portion of the condemnation award attributable to PG&E's interest in the property (the condemnation award) without interest or (2) offset the condemnation award against the sale price of the property.

B. The Proposed Agreements

1. The Purchase and Sale Agreement

In the purchase and sale agreement, PG&E agreed to sell the property to Froehlich for \$120,000. PG&E has reserved easements for its facilities as described above. Froehlich may not assign the agreement without the prior written consent of PG&E and the satisfaction of certain other conditions imposed by PG&E. The agreement also addresses escrow instructions and other items typically included in property sales agreements.

The agreement states that PG&E is selling the property on an “as is” basis and that PG&E has made no warranties or representations regarding the condition of the property, including the presence of electromagnetic fields (EMFs) or hazardous substances at the site, the condition of the groundwater or soil, or compliance with legal requirements. However, PG&E acknowledged in the agreement that at some point, PG&E may have handled, treated, stored and/or disposed of hazardous substances on the property. The agreement states that Froehlich is advised to independently investigate all aspects of the condition of the property, including the presence of EMFs and hazardous substances at the site.

Under the agreement, Froehlich had 45 days to inspect the condition of the property after the effective date of the agreement, and could conduct invasive tests, such as soil and groundwater sampling, with PG&E’s approval. The agreement also requires Froehlich to sign a release agreement to protect PG&E from liability based on the presence of EMFs or hazardous substances on, under, about, or otherwise affecting the property.

2. The Release and Indemnity Agreement

Under the release and indemnity agreement, Froehlich bears all responsibility, costs, and risks associated with the presence of hazardous substances and EMFs on the property. The agreement states that Froehlich has had the opportunity to perform environmental inspections, tests, and studies, including invasive testing and groundwater sampling on, under, about, or adjacent to the property as Froehlich deemed necessary to assume this risk of liability. The agreement also states that the parties have considered Froehlich’s assumption of these risks in establishing the purchase price for the property.

Froehlich has agreed to release, exonerate, and discharge PG&E from any claims or liability that may result from the presence or suspected presence, generation, processing, use, management, treatment, storage, disposal, remediation, transportation, recycling, emission, release, or threatened emission or release of any hazardous substances or EMFs on, about, adjacent to, or affecting the property, whether in the past, present, or future.

Froehlich has also agreed to indemnify, defend, and hold PG&E harmless from liability based on the presence, dumping, escape, seepage, leakage, spillage, discharge, emission, pumping, emptying, injecting, leaching, pouring, release or threatened release of any hazardous substance on, under, from or affecting the property, whether or not the hazardous substances were present on the property at the time of the transfer of title to Froehlich.

Since Froehlich has waived the protections of Civil Code Section 1542, these obligations will apply to future claims based on facts of which Froehlich is not presently aware.⁷

The terms of the release and indemnity agreement will apply to the successors and assigns of the parties. However, a transfer of the property will not relieve Froehlich of its obligations under the agreement.

C. Environmental Review

The California Environmental Quality Act (Public Resources Code Sections 21000, et seq., hereafter CEQA), applies to discretionary projects to be

⁷ Civil Code Section 1542 states:

Section 1542. General Release

A general release does not extend to claims which a creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor.

carried out or approved by public agencies. A basic purpose of CEQA is to “inform governmental decision-makers and the public about the potential, significant environmental effects of the proposed activities.” (Title 14 of the California Code of Regulations, hereinafter CEQA Guidelines, Section 15002.)

Since the proposed project is subject to CEQA and the Commission must issue a discretionary decision without which the project cannot proceed (i.e., the Commission must act on the Section 851 application), this Commission must act as either a Lead or a Responsible Agency under CEQA. The Lead Agency is the public agency with the greatest responsibility for supervising or approving the project as a whole (CEQA Guidelines, Section 15051(b)). The duties of a Responsible Agency are contained in CEQA Guidelines, Section 15096.

Here, the City is the Lead Agency for the project under CEQA. The Commission is a Responsible Agency for this proposed project under CEQA. CEQA requires that the Commission consider the environmental consequences of a project that is subject to its discretionary approval. In particular, the Commission must consider the Lead Agency’s environmental documents and findings before acting upon or approving the project (CEQA Guidelines, Section 15050(b)). The specific activities that must be conducted by a Responsible Agency are contained in CEQA Guidelines, Section 15096.

The proposed project reviewed by the City consisted of converting the existing empty agricultural lot to a multi-dimensional family recreation/aquatics facility with associated parking. The City exercised discretionary authority over this project by virtue of the zoning change from C-2 (Regional Commercial) to Planned Commercial Development.

On July 17, 1995, the City Planning Commission released a Draft Mitigated Negative Declaration (DMND), and circulated the DMND through the

State Clearinghouse for review by State agencies and the public (SCH #1995072099).

A proposed Final Mitigated Negative Declaration (FMND) was made available to the public on August 17, 1995. Although the FMND found that residual impacts were anticipated in Traffic, Noise and Visual Resources, the FMND incorporates resource impact mitigation measures designed to reduce the potential impacts to a less than significant level.

On September 7, 1995, the Planning Commission received the proposed FMND, the staff reports, and the comments, statements, and other evidence presented by all persons, including members of the public who appeared and addressed the Planning Commission. The Planning Commission subsequently took discretionary action on the Project and certified the FMND, adopted the Findings of Fact, and approved the project pursuant to Resolution No. 63-95. On March 6, 1996, the City Council approved the Planning Commission action pursuant to Ordinance #3707. On March 11, 1996, a Notice of Determination was filed with the Clerk of the Board of Kern County, in compliance with Sections 21108 and 21152 of the Public Resources Code.

The City has indicated that the proposed parking lot was approved in its CEQA process and is an acceptable use within the area of the PG&E facilities at this location. Accordingly, no additional environmental review is required.

We have reviewed the City's environmental documents and find them adequate for our decision-making purposes. We also find that the City reasonably concluded that the project, as approved, will not have a significant negative effect on the environment. Accordingly, we adopt the City's environmental documents and conclusions for the purposes of our approval of this application.

D. Ratemaking Considerations

According to the application, PG&E originally purchased the property for \$7,422. The property currently has a net book value of \$7,422. PG&E's anticipated gross gain on sale before taxes is \$110,828, and the net gain on sale after taxes will be \$65,670.

The property is currently in PG&E's rate base and will not be removed until the sale is final.

Although the Commission has jurisdiction over the transfers of utility property under Section 851, the sale of transmission property is generally subject to Federal Energy Regulatory Commission (FERC) jurisdiction for ratemaking purposes.⁸ ORA argues that the property being sold to Froehlich is not transmission property, because PG&E is retaining easements for the transmission facilities and is selling only the underlying land. The parties have stipulated that the property is classified as a transmission asset in PG&E's transmission rate base, and that PG&E has been recovering maintenance and operating costs related to the property through FERC ratemaking for transmission purposes.⁹ ORA also contends that FERC jurisdiction over transmission ratemaking does not preempt our jurisdiction over ratemaking issues related to the disposal of utility property. In addition, ORA states that the gain on sale should be allocated to ratepayers, because the property has been part of PG&E's rate base and ratepayers have borne the costs of maintaining the property over the years.

⁸ D.03-04-033, at page 25; D.02-01-012.

⁹ Joint Management Statement and Submission of Stipulated Facts (Stipulation), at page 4, paragraphs 11 and 12.

However, the Commission will be initiating a rulemaking to address the allocation of a utility's gain on sale between shareholders and ratepayers on a broad, policy basis in the near future, and we believe that it is more appropriate to consider the ratemaking issues raised by the parties in that forum. We therefore defer our decision on the allocation of PG&E's gain on sale to the upcoming gain on sale rulemaking. The parties may wish to pursue the additional issues raised in their briefs in that forum.¹⁰

Since the City has condemned a portion of the property, PG&E shall either assign the applicable condemnation award to Froehlich or may reduce the purchase price by the amount of the condemnation award.

E. Discussion

Section 851 provides that no public utility "shall . . . sell . . . the whole or any part of . . . property necessary or useful in the performance of its duties to the public, . . . without first having secured from the Commission an order authorizing it to do so."

The primary question for the Commission in Section 851 proceedings is whether the proposed transaction is in the public interest. In reviewing a Section 851 application, the Commission may "take such action, as a condition to the transfer, as the public interest may require."¹¹ The public interest is served when utility property is used for other productive purposes without interfering

¹⁰ These issues relate to whether all or part of the gain on sale of utility property should be allocated to ratepayers because they paid the costs of depreciation, maintenance, and taxes while the property was in rate base.

¹¹ D.3320, 10 CRRC 56, 63.

with the utility's operation or affecting the availability of adequate service to the public at reasonable rates.¹²

We find that the proposed sale of PG&E property to Froehlich is in the public interest. PG&E no longer needs to own the property in fee for utility purposes and has reserved easements as necessary to carry out its operations and to serve its customers and the public. Although PG&E has acknowledged that hazardous substances and EMFs may exist at or around the property, PG&E is adequately protected from any potential liability by the terms of the purchase and sale agreement and the release and indemnity agreement. Sale of the property to Froehlich for use as a parking lot will not have significant adverse effects on the environment. Sale of the property will also benefit ratepayers, because they will no longer have to pay for maintenance, taxes, insurance, and other expenses related to the property.

For all of the foregoing reasons, we grant the application of PG&E pursuant to Section 851, effective immediately.

III. Final Categorization and Review and Comment Period

Based on our review of this application, we conclude that there is no need to alter the preliminary determinations as to categorization and need for a hearing made in Resolution ALJ 176-3102, dated December 5, 2002.

The draft decision of Administrative Law Judge (ALJ) Prestidge was mailed to the parties in accordance with Section 311(g)(1) and Rule 77.7 of the Rules of Practice and Procedure on January 23, 2004. Comments were received on February 11, 2004.

¹² D.00-07-010 at p. 6.

ORA's comments urge the Commission to decide the gain on sale issue in this proceeding. However, for the previously stated reasons, we wish to defer this issue to the upcoming gain on sale rulemaking and therefore make no changes in response to ORA's comments.

We have made minor technical revisions to the decision in response to PG&E's comments.

IV. Assignment of Proceeding

Geoffrey F. Brown is the Assigned Commissioner and Myra J. Prestidge is the assigned ALJ in this proceeding.

Findings of Fact

1. The property that PG&E wishes to sell to Froehlich consists of two unimproved parcels located in the City of Bakersfield, County of Kern, identified as County Assessor's Parcel Numbers 501-010-12 and 501-010-20.
2. PG&E originally purchased the land for use as a transmission corridor to accommodate transmission lines running southerly from PG&E's Kern Power Plant.
3. PG&E currently operates three electric transmission tower lines and one wood pole distribution line that traverse the property and owns transmission towers on the site.
4. The City has condemned a small portion of the northern border of the property.
5. As a condition of the sale, PG&E has reserved easements necessary to operate, maintain, reconstruct or replace both its existing transmission facilities and any new facilities constructed for transmission, distribution, or communication purposes on the property.

6. Froehlich currently plans to utilize the property as a parking lot with a landscaped buffer between the parking area and PG&E transmission facilities that will remain on the site.

7. The agreement protects PG&E from potential liability based on the condition of the property, including the possible presence of any EMFs or hazardous materials on the site.

8. The City is the Lead Agency for the proposed parking lot project under CEQA.

9. The City prepared a DMND for the project, which found that the proposed project would have a less than significant effect on the environment.

10. On March 11, 1996, the City Council certified the FMND, adopted the Findings of Fact, and approved the project pursuant to Ordinance #3707.

11. The Commission is a Responsible Agency for the proposed project under CEQA.

12. Consistent with the City's findings and determinations, we find that the proposed project will have a less than significant effect on the environment.

13. The property is classified as a transmission asset in PG&E's transmission rate base.

14. The property will remain in rate base until the sale to Froehlich is final.

15. PG&E has been recovering maintenance and operating costs for the property through FERC ratemaking for transmission purposes.

16. PG&E no longer needs to own the property in fee for utility purposes.

17. The proposed sale will not affect the availability of adequate service to the public at reasonable rates, because PG&E has reserved easements as necessary to carry out utility functions.

18. The proposed sale benefits ratepayers because they will no longer need to pay the costs of maintenance and taxes on the property.

Conclusions of Law

1. The Mitigated Negative Declaration, Notice of Determination, and Ordinance #3707 adopted by the Bakersfield City Council are adequate for the Commission's decision-making purposes as a Responsible Agency under CEQA.
2. Consistent with Section 851, PG&E's sale of the property to Froehlich is in the public interest and should be authorized.
3. Although the Commission has jurisdiction over transfers of utility property under Section 851, transmission property is generally subject to FERC jurisdiction for ratemaking purposes.
4. Our decision on the allocation of PG&E's gain resulting from the sale of the property is deferred to the Commission gain on sale rulemaking, to be initiated in the near future.
5. This decision should be effective today in order to allow the property to be conveyed to Froehlich expeditiously.

O R D E R**IT IS ORDERED** that:

1. Pacific Gas and Electric Company (PG&E) is authorized to sell the property, as described in Exhibit A to the Response of PG&E to Administrative Law Judge Myra Prestidge's Ruling Requesting Supplemental Information, to Froehlich Construction Co., Inc. (Froehlich).
2. PG&E shall allocate the gain resulting from the sale of the property as determined in the upcoming Commission gain on sale rulemaking.
3. PG&E shall either assign the condemnation award received from the City of Bakersfield (the City) based on the City's acquisition of a portion of the

property to Froehlich or may reduce the purchase price by the amount of the condemnation award.

4. This proceeding is closed.

This order is effective today.

Dated _____, at San Francisco, California.